IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3866 OF 1991.

1. Smt. Najama Gulab Bagwan,
   age about 47 years, occupation
   Household work.
2. Smt. Jubeda Bashir Bagwan,
   age about 32 years, occupation
   Household work,
3. Kum. Akila Gulab Bagwan,
   age about 21 years,
4. Nisar Gulab Bagwan,
   age 18 years,
5. Kum. Phiroj Gulab Bagwan,
   age 16 years, minor, by her guardian
   mother at Sr. No.1 above,
6. Sardar Sonaji Bagwan, since deceased
   by his heirs,
   6A. Mahiboob Sardar Bagwan,
   6B. Taiseen Mahiboob Bagwan,
   6C. Rafique Sardar Bagwan,
   6D. Raju Sardar Bagwan,
   6E. Smt. Shakila Yusufbhai Bagwan,
   6F. Smt. Shabana Ibhram Rampure,

All residing at Baramati,
Tal. Baramati, Dist. Pune. .. Petitioners (Orig. Defdts.)

Versus

Smt. Laxmibai w/o Rangildas Gujar,
since deceased by her heirs and legal
representatives:
1. Vinodkumar Rangildas Gujar,
2. Kisandas Rangildas Gujar,
3. Chimanlal Rangildas Gujar,

All residing Baramati, Tal. Baramati,
District Pune. .. Respondents (heirs of Orig. Plaintiff)

Mr. P.K. Hushing for the petitioners.

Mr. A.A. Kumbhakoni for the respondent Nos.1 and 3.

CORAM: ANOOP V. MOHTA, J.

DATED: 8TH AUGUST, 2005

ORAL JUDGMENT. :

1. The Petitioners are tenants. The Respondents are landlords. The premises in question, as referred in the Plaint, consists of House No.161, City Survey No.450, situated at Ward No.2 at Baramati District Pune, having 6 Khans area flat roofs i.e. "Malwadi" and "Kilasbandi" was let out at the rate of Rs.250/- per month. Both the Courts, after considering the material placed on the record, including the rival contentions raised by the parties, granted the decree for possession on the ground of unauthorized permanent structure, as contemplated under Section 13(1)(b) read with Section 23 of the Bombay Rents, Hotel Lodging House Rates Control Act, 1947, (for short "The Bombay Rent Act"). Therefore, the present Writ Petition by the tenants.

2. Heard learned counsel Mr. P.K. Hushing for the petitioners and Mr. A.A. Kumbhakoni for the respondents. The undisputed position in the present case, as referred by the Additional District Judge, Baramati District Pune (for short "Appellate Court") is

relevant to cover the rival contention of the parties (i.e. paragraph 17).

> "17. The word permanent structure has not been defined under Bombay Rent Act. But the permanent or temporary character of the structure would have to be determined, having regard to the nature of the structure and the nature of the material used in the making of the structure and the manner in which the structure is erected. The test provided by the Legislation is thus an objective test and not a subjective test. The structure which fulfils the objective test by having a permanent element would not seized to be so merely because of the intention of the tenant. Whether a particular construction is a permanent structure or is merely of a temporary nature is a question which depends on the facts of each case in determining whether the structure is a permanent or not on certain things shall have required to be considered. Firstly, the nature of the structure. Secondly, the intention with which it is made. Thirdly, a citus and forthly the mode of annexation, where the purpose is that the structure should be permanently used, the structure is permanent whatever may be the nature of material applied for its construction. In the light of these tests, the present putting of 12 wooden rafters and tin sheet-roofs over the suit premises shall have to be considered. A permanent nature construction made on the roof putting rafters and placing tin sheet roofs thereon, falls within the mischief of Clause (b) of Sub Section (1) of Section 13 of the Bombay Rent Act. Therefore, the trial judge has rightly held that the construction effected by the defendant-tenant comes within the purview of erection of permanent nature construction. It is not a temporary nature or a tenantable repairs as urged by the learned Advocate for appellant in this regard. Admittedly, the appellant-defendant have not obtained any permission

> in writing from the plaintiff land-lady before its construction. It is pertinent to note that the suit premises let out to the mother of defendant was having a flat roof Malwadi and Kilasbandi. This fact has not been denied on behalf of the defendant-tenant. It is also undisputed that the defendants have put 12 wooden rafters and placed 18 tin sheet roofs in place of that roof or Kilasbandi. Therefore, it is clear that the defendant-appellant have made a permanent alteration in the suit premises. The removing of flat roof or Kilasbandi and putting wooden rafters and tin sheet roofs over the suit premises which materially or substantially changed the existing structure of the suit premises which comes within the mischief of Section 13(1)(b) of the Bombay Rent Act."

3. The Scheme of the Bombay Rent Act in regard to Section 13(1)(b) read with Section 23 is necessary to keep in mind, while deciding the merits of the matter. Section 13(1)(b) is reproduced with the explanation, as also Section 23 as follows:

> "13(1)(b) that the tenant has, without the landlord’s consent given in writing, erected on the premises any permanent structure;
>
> [Explanation, - For the purposes of this clause, the expression "permanent structure" does not include the carrying out of any work, with the permission, wherever necessary, of the local authority, for providing a wooden partition, standing cooking platform in kitchen, door, lattice work or opening of a window necessary for ventilation, a flase ceiling , installation of air-conditioner, an exhaust outlet or a smoke chimney; or];"

> 23. **Landlord's duty to keep premises in good repair.** (1) Notwithstanding anything contained in any law for the time being in force and in the absence of an agreement to the contrary by the tenant, every landlord shall be bound to keep the premises in good and tenantable repair."
>
> (2) If the landlord neglects to make any repairs, which he is bound to make under sub-section (1), within a reasonable time after a notice [of not less than fifteen days] is served upon him by post or in any other manner by a tenant or jointly by tenants interested in such repairs, such tenant or tenants, may themselves make the same and deduct the expenses of such repairs from the rent or otherwise recover them from the landlord;
>
> Provided that where the repairs are jointly made by the tenants the amount to be; deducted or recovered by each tenant shall bear the same ;proportion as the rent payable by him in respect of his premises bears to the total amount of these expenses incurred for such repairs [together with simple interest at the rate of fifteen per cent, per annum of such amount];
>
> Provided further that the amount so deducted or recoverable in any year shall not exceed [one-fourth] of the rent payable by the tenant for that year.
>
> (3) For the purposes of calculating the expenses of the repairs made under sub-section (2), the accounts together with the vouchers maintained by the tenants shall be conclusive evidence of such expenditure and shall be binding on the landlord."

Therefore, written permission from the landlord is a must insofar as permanent structure is concerned and so far as repairs, a fifteen days' written notice is

necessary. In both these cases, tenant cannot act unilaterally of his own, without the written permission for permanent construction and the written notice for any repairs, to keep the premises in good and tenantable condition.

4. There are no definition of the words "permanent structure" and "repairs" or "reconstruction" under the Bombay Rent Act.

5. The learned counsel appearing for the respondent has relied on a catena of judgments in support of his submission, as well as, in support of the reasoning given by the Courts below. Those decisions are as follows. **Vimalabai Jayant Pawar Vs. Laxmibai Jayawantrao Nandrekar** 1984, Bom.R.C., 363; **Somnath Krishnaji Gangal Vs. Moreshwar K. Kale & Ors.** 1995(1) Mh.L.J., 675, **Ramakant Ganpati Potdar & Anr. Vs. Madhav Ganesh Dixit** 1989, Mah. R.C.J., 387, **Shadisingh Vs. Rakha** (1992) 3, S.C.C., 55, **Surajmal Vs. Indian National** AIR 1956 Cal. 187, **Commissioner of Income-tax Vs. Rana Sugar Mills** AIR 1952, Madras, 689, **Venkatlal G. Pittie Vs. Bright Bros.** (1987), 3 S.C.C., 558.

6. The Apex Court in **Venkatlal** (supra), while considering the Bombay Rent Act and specially Section

13(1)(b) read with Section 108(p) of the Transfer of Property Act has observed as under:

> "The High Court observed that, in judging whether the structures were permanent or not, the following factors should be taken into consideration referring to an unreported decision of Malvankar, J. in Special Civil Application No. 121 of 1968. These were (1) intention of the party who put up the structures; (2) this intention was to be gathered from the mode and degree of annexation; (3) if the structure cannot be removed without doing irreparable damage to the demised premises then that would be certainly one the circumstances to be considered while deciding the question of intention. Likewise, dimensions of the structure and (4) its removability had to be taken into consideration. But these were not the sole tests. (5) The purpose of erecting the structure is another relevant factor. (6) The nature of the material used for the structure and (7) lastly the durability of the structure. These were the broad tests. The High Court applied these tests. So had the trial court as well as the appellate Bench of Court of Small Causes."

7. The Apex Court, while considering the provisions of East Punjab Urban Rent Restriction Act, 1949, but related to the issue in question of "reconstruction" and "repairs" observed in **Shadisingh** (supra) as under:

> "There is a distinction between effecting repairs and in its guise to make structural alteration or to restructure

> the building. The tenant cannot effect structural alteration or reconstruct the building. It is the right of the landlord alone to exclusively have it done, unless of course, the landlord having had the tenant evicted from the building for that purpose and demolished the building failed to reconstruct and redeliver possession thereof to the tenant. In a given case if the tenant acts unilaterally and effects structural alterations or reconstruct the building, it itself may be a ground for eviction under the appropriate provision of the statute. [emphasis supplied]

8. The Bombay High Court in **Somnath** 1995 (1) Mh.L.J., 675, after considering the Scheme in question of the Bombay Rent Act and also after considering **Om Prakash Vs. Amar Singh & Anr.** AIR 1987, S.C., 617 and other various judgments of the Bombay High Court concluded as under:

> "In view of the decision of the Hon'ble Supreme Court and of this Court, my conclusions are as under:
>
> (i) In deciding the question as to what is a "permanent structure", it is necessary to consider the mode and degree of annexation as also the intention of the party putting up the structure. The creation of such a work or addition thereof in order to amount to a permanent structure must cause and bring about a substantial improvement and change in the nature and form of accommodation.
>
> (ii) If what has been done is by way of minor repairs for the better enjoyment and use of the premises, it cannot be regarded as a permanent structure. Similarly, if the object and purpose of annexation was

> only to better the mode of enjoyment of the demised premises as in the case of construction of the kitchen platform, it does not amount to a permanent structure within the meaning of Section 13(1)(b) of the said Rent Act.
>
> (iii) The essential element which needs consideration is as to whether the construction is substantial in nature and whether it alters the form, front and structure of the accommodation.
>
> (iv) If what the tenant does is large scale renovation like replacement of the entire roof, covering it with marble tiles, without obtaining permission of the landlord, it may amount to permanent structure within the meaning of section 13(1)(b) of the Rent Act. [emphasis supplied]
>
> (v) Similarly, if the tenant constructs a bathroom in the gallery which puts additional burden in the gallery which is harmful to the structure of the building, it would amount to a permanent structure."

9. Another aspect of the word "repairs" and "reconstruction" has been considered by the Bombay High Court in **Ramakant** (supra) and as relied by both the parties, is reproduced as under:

> "7. The expression "repairs" and "reconstruction" are not defined in the Act. Therefore, in order to construe provisions of the Bombay Rent Act where the same words occur, one has to take recourse to the ordinary dictionary meaning of such words, and to find out what is the connotation which is in conformity and in harmony with the Act. The meaning of such words which further the purpose of the Act and it scope is the meaning that has to be adopted. The Act intends to give protection to tenants from

> their eviction by the landlords. Therefore, eviction of the tenant is permissible only when the grounds laid down in the Act itself are satisfied.
>
> 8. "Repair" means, according to the New Webster's Dictionary, to restore to a sound or good state after decay, injury,l dilapidation, or partial destruction; to make amends for, as for an injury, by an equivalent; to given indemnity for. It also means restoration to a sound or good state of a part which requires reparation. The word "repair", therefore, connotes in common parlance an idea of mending or removing any damage or danger of injury to a particular thing.
>
> By implication, such word indicates that for repairs, the thing should still has existence. If the thing cease to exist, there will be no question of mending or correcting it. In turn, the meaning of "reconstruction" is given in the same dictionary as the act of constructing again or rebuilding. This words, therefore, implies that something that had existence has disappeared and is completely renewed."

10. In the present case, if we take note of the above legal position as a foundation for the purpose of deciding the issue following the undisputed position of facts, it further supports the reasoning given by the Court below. Even though, as contended that the permanent construction or alteration in question was only in the nature of repair and as the Commissioner's Report further supports the same and as the landlord failed to repair the roof in question inspite of oral request, the petitioner had no choice but to get it

repaired without the written permission or consent of the landlord, the basic aspect of intimation and/or notice as contemplated under the provisions of Section 13(1)(b) read with Section 23 cannot be overlooked. Admittedly, there is nothing on the record to suggest or is borne out from the record, in any way, that any written notice, as contemplated under Section 23, was issued in the present case. The case was made out only of oral request by the tenant. As rightly pointed out by the learned counsel appearing for the respondents, Section 23 read with Section 13(1)(b), contemplates that the tenant, in such circumstances, before any such repairs and/or alteration or construction, must issue written notice and obtain written permission from the landlord. In the case in hand, except alleged oral request, not supported by any other witness, there is nothing to support the compliance of the said mandate of the provisions of law.

11. Admittedly there is no case made out or borne out even from the record that the repairs were so urgent that it was not possible for the petitioners-tenants even to wait for some period of time. It is difficult to accept the case of the petitioners- tenants that they repaired the part of the premises by putting the roof after the notice or intimation, as referred above.

Therefore, it remains unrebutted that the tenant, without the written permission from the landlord and without giving any intimation and/or written notice as contemplated under the Act, made the permanent structure. In the present case, if we take the factual aspect, it is very clear that it was a permanent replacement of roof even though of 6 Khans as sought to be contended. It is not the case of just repairing as contemplated and as elaborated by the Courts as in **Ramakant** and **Somnath** (supra) reproduced above. If it is not repairing then the structure in question as reproduced and noted by the Commissioner and as observed by the Courts below rightly amounts to unauthorised permanent structure as contemplated under the Bombay Rent Act. In the present case, admittedly, only part of the premises were got repaired i.e. 3 Khans out of 6 Khans which were let out to the tenants. The contention, therefore, that it was part-repairing of the roof also nowhere supports the provisions of the Scheme of the Act. In the present case, the petitioner-tenant has "reconstructed" the roof. It was not the simple "repairing" as elaborated in **Ramakant** (supra).

12. The explanation to Section 13(1)(b) further clarifies the meaning of the expression "permanent structure" as contemplated under the Bombay Rent Act.

If ordinary definition of "permanent structure" is not available, then the intention of the legislature must be respected as reflected in Section 13(1)(b) and specially the explanation. There is nothing which further supports the case of the petitioners even from the explanation that the tenants, in such circumstances, are entitled and/or have a right to repair the premises in question. The petitioner has not made out any case of exception as contemplated under Section 13(1)(b) to Explanation to the expression "permanent structure". The construction made by the tenant falls within the meaning of "permanent structure" and/or "reconstruction" without written permission. It is not a case of minor repairs.

13. Section 23 of the Act definitely imposes a duty on the landlord to keep the premises in good condition. He is, therefore, under an obligation to make necessary repairs. But, in case of the failure to keep the premises in good condition, there must be a notice or intimation by the tenant to point out the necessity of any such urgent repairs. If there is no such notice issued and the tenant on his own, unilaterally contract, without written intimation and permission of the landlord, such unauthorised permanent construction, in that case, definitely falls within the

clutches of the mandate of Section 13(1)(b) read with Section 23 of the Act. This breach, therefore, raises no doubt that the landlord, in such circumstances, is entitled to claim the possession of the premises [**Shadisingh** (supra)]. As rightly pointed out and as observed by the Courts below that the tenant had no right to get the premises altered or reconstructed in such fashion. There is no such provision available under the Bombay Rent Act which compels the landlord to reconstruct or rebuild in each and every circumstances, except to keep the premises in good and tenantable repair. The tenant cannot unauthorisedly make permanent construction without written permission from the landlord.

14. The learned counsel appearing for the respondents has relied on **Venkatlal** (supra) to justify the reasoning given by the Courts below. The said case also was under the Bombay Rent Act. The Apex Court has observed as follows:

> "All the relevant factors had been borne in mind by the learned trial Judge as well as appellate Bench of the Court of Small Causes. Therefore, simply because another view is possible and on that view a different view is taken, will be interfering under jurisdiction under Article 227 of the Constitution which is unwarranted."

15. In this background, considering the reasoning given by the Courts below read with the provisions of law and specially the Scheme of the Bombay Rent Act, I am of the view that there is no case made out by the petitioners to interfere with the concurrent finding given by the Courts below.

16. Resultantly, the Writ Petition is dismissed. Rule is discharged. Interim stay vacated.

[ANOOP V. MOHTA, J.]

[srpasha@hc]